Portponed. 10-255

Affirmed.

Jud, Dec

Dec

Affirmed

Judge Story Dec

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED ST

No. ~~401.~~ 166

THE MUTUAL LIFE INSURANCE COMPANY OF NE
PLAINTIFF IN ERROR,

vs.

MARY TERRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATE
DISTRICT OF KANSAS.

FILED NOVEMBER 23, 1871.

Dec. 7, 187

# SUPREME COURT OF UNITED STATES.

DECEMBER TERM, 1871.

FRANK PARTRIDGE,

*Plaintiff in Error*

*vs.*

THE PHŒNIX MUTUAL LIFE INSURANCE CO.,

*Defendant in Error.*

STATEMENT AND BRIEF

*Of Defendant in Error,*

By N. P. Chipman.

Portions. 16-250
Affirmed.
Judge Davis
Delivered
March 14
Success
Affirmed
Judge Story Dunn

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~401.~~ 166

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

MARY TERRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED NOVEMBER 23, 1871.

Dec. 2, 1872

# SUPREME COURT OF THE UNITED STATES.

## No. 401.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

MARY TERRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 Pleas before the Hon. Samuel F. Miller and Hon. Jno. F. Dillon, judges of the circuit court of the United States for the district of Kansas, at a term of said court begun and held at the city of Topeka, in said district, on Monday, the 22nd day of May, 1871.

MARY TERRY, PLAINTIFF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, defendant. } No. 220.

Be it remembered that, on the 19th day of May, A. D. 1870, the said defendant, The Mutual Life Insurance Company of New York, filed in the clerk's office of the circuit court of the United States for the district of Kansas a transcript and copies of proceedings had in said case in the district court in and for the county of Douglas, and State of Kansas; which said transcript and copies of proceedings are in words and figures following, to wit:

Be it remembered that, heretofore, to wit, on the 5th day of October, A. D. 1869, Mary Terry, plaintiff, filed in the office of the clerk of the
2 district court sitting in and for Douglas County, State of Kansas, her certain petition and precipe for summons against The Mutual Life Insurance Company of New York, defendant; which said petition and precipe is in words and figures as follows, to wit:

*Petition.*

In the district court of Douglas County, Kansas.

MARY TERRY, PLAINTIFF,
*against*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, defendant. } 1391.

The said plaintiff says that the said defendants are a corporation duly created under the laws of the State of New York.

That, on the 22nd day of July, A. D. 1867, at the city of New York, in the State of New York, in consideration of the payment by the plaintiff to the defendant of the premium of $92.84, annually, during the life on George Terry, who was then the husband of the said plaintiff, the defendants, by their agents, duly authorized thereto, made their policy of insurance in writing on the life of said George Terry, for the sole use of the said plaintiff, who was then the wife of said George Terry, in the sum of $2,000, and then delivered the said policy of insurance to the said plaintiff, of which the following is a copy:

3 "No. 66,429.

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

"Age, 50 years.] [Amount, $2,000.

"Annual premium, $92.84.

"In consideration of the representations made to them in the application for this policy, and of the sum of ninety-two dollars and eighty-four cents to them duly paid by Mary Terry, wife of George Terry, manufac-

turer, and of the annual payment of a like amount on or before the twenty-second day of July, in every year during the continuance of this policy, do assure the life of the said George Terry, of Lawrence, in the county of Douglas, State of Kansas, for the sole use of his said wife, in the amount of two thousand dollars for the term of his natural life. And the said company do hereby promise and agree to pay the amount of the said insurance at their office in the city of New York to the said assured for her sole use, if living, in conformity to the statute; and if not living, to her children or their guardian for their use, in sixty days after due notice and proof of the death of the said party whose life is hereby insured; the balance of the years' premium, if any, being first deducted therefrom.

This policy is issued and accepted by the assured, upon the following express conditions and agreements:

4 "1st. If the said person, whose life is hereby insured, shall pass or remain beyond the settled limits or the protection of the Government of the United States, (except into the settled limits of the British provinces,) or west of the 109th degree of west longitude, or north of the 50th degree of north latitude, or between the first of July and the 1st of November, south of the parallel of 36° 30′ north latitude; or shall enter upon a voyage upon the high seas; or shall be personally engaged in blasting, mining, submarine operations, or the production of highly-inflam'able or explosive substances or in working or managing a steam-engine, or as a mariner, engineer, foreman, conductor, or laborer in any capacity, upon service on any sea, sound, inlet, river, lake, or railroad; or enter into any military or naval service whatsoever, (excepting into the militia when not in actual service,) without the consent of this company, in each or either of the foregoing cases, previously given in writing; or if he shall die by his own hand or in consequence of a duel, or if the violation of the laws of any nation, State, or province; or if he shall aid

5 or abet any insurrection against the State of New York, or the United States, or perform any labor or service, civil or military, in aid of any such insurrection; or if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case this policy shall be null and void.

"2nd. If the said premiums shall not be paid on or before the days above mentioned for the payment thereof at the office of the company in the city of New York, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president or secretary, then, in every such case, the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and determine.

"3d. In every case when this policy shall cease and determine, or become or be null and void, all payments thereon shall be forfeited to this company.

"4th. If this policy should be assigned or held as security, written notice shall be given to this company, and due proof of interest produced with the proof of death.

"In witness whereof the said The Mutual Life Insurance Com-

6 pany of New York, have, by their president and secretary, signed and delivered this contract this twenty-second day of July, one thousand eight hundred and sixty-seven.

"RICHARD A. McCURDY,
"*Vice President.*

"JNO. M. STEWART, *Secretary.*"

[Fifty cents internal United States—Conveyance.]

The said plaintiff further says that, up to the time of the death of the said George Terry, all premiums, accrued upon said policy, were duly paid, and that said policy of insurance was, in all respects, in full force and virtue.

That, on the 20th day of April, A. D. 1869, at Lawrence, in the county of Douglas, and State of Kansas, said George Terry died, which death was not caused by the said George Terry's own hand, nor in consequence of a duel, nor in consequence of the violation of the laws of any nation, state, or province.

The said plaintiff further says that the said George Terry did not, on or after the 22d day of July, A. D. 1867, pass or remain beyond the settled limits or protection of the Government of the United States, (except into the settled limits of the British provinces,) or west of the 109th degree of west longitude, or north of the 50th degree of north latitude, nor between the 1st of July and the 1st of November, south of the
7 parallel of 36° 30′ of north latitude; nor did, on or after the 22nd day of July, A. D. 1867, enter upon a voyage upon the high seas, nor personally engage in blasting, mining, submarine operations, nor in the production of highly inflam'able or explosive substances, nor in working or managing a steam-engine in any capacity, nor as a mariner, engineer, foreman, conductor, or laborer, in any capacity, upon service on any sea, sound, inlet, river, lake, or railroad; nor did he on or after the said date, enter any military or naval service whatsoever; nor did he on or after said 22nd day of July, A. D. 1867, aid or abet any insurrection against the State of New York, or the United States, or perform any labor or service, civil or military in aid of any such insurrection; nor was any statement or declaration made in the application for said policy untrue.

The said plaintiff further says, that she duly performed all the conditions of said policy of insurance on her part; and the plaintiff, more than sixty days before the commencement of this action, to wit, on the 28th day of June, A. D. 1869, at the defendant's office, gave the defendant due notice and proof of the death of said George Terry,
8 as aforesaid, and duly demanded payment of the said sum of $2,000, but no part thereof has been paid, and the defendants are indebted to the plaintiff thereon in the sum of $2,000, with interest thereon from the 28th day of August, A. D. 1869, for which she asks judgment,

RIGGS, NEVISON & FOOTE,
*Att'ys for Plaintiff.*

In the district court of Douglas County, Kansas.

MARY TERRY, PL'FF
*vs.*
THE MUTUAL LIFE INSURANCE CO. OF NEW YORK, def't. } Civil action.

The clerk of said circuit will issue a summons for the said defendants, directed to the sheriff of said county of Douglas.

The plaintiff claims that there is due her, from the said defendant, the sum of $2,000 and interest thereon from the 28th day of August, A. D. 1869, for which she asks judgment.

RIGGS, NEVISON & FOOTE,
*Att'ys for Plaintiffs.*

SEPTEMBER 30TH, 1869.

Afterwards, to wit, on the 5th day of October, A. D. 1869, a summons was issued on said precipe, to the sheriff of Douglas County, which summons is in the words as follows, to wit:

9 STATE OF KANSAS, *County of Douglas, ss:*

The State of Kansas, Douglas County, to the sheriff of Douglas County, greeting:

You are hereby commanded to notify The Mutual Life Insurance Company of New York, that it has been sued by Mary Terry, in the district court, fourth judicial district, State of Kansas, sitting within and for the county of Douglas, and that it must answer the petition filed against it in the clerk's office of the said court, on or before the fourth day of November, A. D. 1869, or such petition will be taken as true and judgement rendered accordingly.

You will make due return of this summons on or before the 15th day of October, A. D. 1869.

Witness my hand and the seal of said court, at my office, in the city of Lawrence, in the said county of Douglas, this 5th day of October, A. D. 1869.

[SEAL.]

B. D. PALMER, *Clerk.*
By A. J. REID, *Deputy.*

Afterward, to wit, on the 6th day of October, A. D. 1869, said summons was returned and filed in the office of the clerk of said court, with the following return endorsed thereon, to wit:

10 Received the within summons the 6th day of October, A. D. 1869, at 9 o'clock a. m.

October 6th, 1869. Served this writ this day on John A. Bliss, agent of The Mutual Life Insurance Company of New York, by delivering to him, personally, a true and correct copy of this writ:

SAMUEL WALKER,
*Sheriff of Douglas County, Kansas.*

Fees, 70.

Afterwards, to wit, on the 4th day of November, A. D. 1869, the following answer of defendant was filed in the office of the clerk of said court in words as follows, to wit:

*Answer.*

STATE OF KANSAS, *Douglas County:*

In the district court of the fourth judicial district, in and for the county and State aforesaid.

MARY TERRY, PL'FF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York, def't.

The defendants, for answer to the petition of the said plaintiff,
11 say that they admit the execution of the policy of insurance mentioned in said plaintiff's petition, but deny each and every other allegation therein contained.

BURLEIGH, HOPKINS & FRANCIS AND
SHANNON AND SHANNON,
*Att'ys for Defendant.*

Afterwards, to wit, on the 22nd day of November, A. D. 1869, the following affidavit for removal of this cause into the next term of the circuit court of the United States for the district of Kansas, to be held in said district, was filed in the clerk's office of the said court by defendant, and is in words as follows, to wit:

*Affidavit for removal.*

STATE OF KANSAS,
*Fourth Judicial District, Douglass County, ss:*

In the district court in and for said county.

MARY TERRY, PL'FF,
*ag'st*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, def't.

12 STATE OF MISSOURI, *County of St Louis, ss:*

The undersigned, Charles F. Mills, of lawful age, being first duly sworn, doth depose and say, that he is the duly authorized general agent and manager for the States of Missouri, Kansas, & of the Mutual Life Insurance Company of New York, the defendant in the above-entitled cause, and that he has read the foregoing and annexed statement of facts and petition of said defendant, and knows the contents thereof, and that the same are true. Affiant further says that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs, as will appear to the court, by reference to the petition of said plaintiff filed in said suit, and that he has reason to and does believe that, from prejudice, & also from local influence, said defendant will not be able to obtain justice in the above-named district court of the fourth judicial district of the State of Kansas.

CHARLES F. MILLS.

Subscribed in my presence and sworn to before me this 17th day of November, A. D. 1869.

[SEAL.] E. W. PATTESON,
13 *Notary Public in and for St. Louis County, State of Missouri.*

Afterwards, to wit, on the same day the following petition for removal of this cause into the next term of the circuit of the United States for the district of Kansas to be held in said district, was filed in the clerk's office of the district court in and for Douglas County, Kansas, and is in words as follows, to wit:

*Petition for removal.*

STATE OF KANSAS,
*Fourth Judicial District, Douglas County, sct:*

In the district court in and for said county.

MARY TERRY, PL'FF,
*against*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, def't.

And now comes the Mutual Life Insurance Company of New York, defendant in the above-entitled suit, by their attorneys, and enter their

appearance in said suit, and the said defendant shews to this honorable court that the plaintiff in said suit was, at the time of the commencement thereof, ever since has been, & still is, a citizen of the State of Kansas; and that the said defendant was, at the time of the com-
14 mencement of the said suit, ever since has been, and still is, a corporation duly organized under the laws of the State of New York.

And the defendant further shows that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs, as will appear to the court by reference to the petition of the said plaintiff filed in said suit, wherein she claims to recover of the said defendant the sum of two thousand dollars, with interest thereon, at the rate of seven per cent. per annum, from the twenty-eighth day of August, A. D. 1869, with costs. Therefore the defendant prays that, in accordance with the law of Congress in such case made and provided, an order may be made by this honorable court, that said suit may be removed into the next term of the circuit court of the United States for the district of Kansas to be held in said district, and the said defendant bound in the penal sum of $ as surety, that the said defendant will enter in said circuit court of the United States on the first day of its session aforesaid, copies of all process, pleadings, depositions, testimony, and the proceedings in said suit; and that said defendant will then appear in said circuit court in said suit, and that said defendant will
15 then do all such other appropriate acts, as by any act of Congress are required to be done, upon the removal of a suit from a state court into a circuit court of the United States.

BURLEIGH, HOPKINS & FRANCIS,
*Att'ys for Def't.*

Afterwards, to wit, on the 24th day of November, A. D. 1869, the following bond for removal of this cause into the next term of the circuit of the United States for the district of Kansas, to be held in said district, was filed in the clerk's office of district court sitting in and for Douglas County, Kansas, which bond is in words as follows, to wit:

*Bond for removal.*

STATE OF KANSAS,
*Fourth Judicial District, Douglas County, ss:*

In the district court in and for said county.

MARY TERRY, PL'FF,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF New York, def't.

Know all men by these presents that The Mutual Life Insurance Company of New York, as principal, and Thomas Carney & H. W.
16 Gillet, of the county of Leavenworth, and , of the county of Douglas, & State of Kansas, as sureties, are held and firmly bound unto Mary Terry, of Douglas County, in the sum of four thousand dollars, to be paid to the said Mary Terry; the payment whereof, well and truly to be made, the said Mutual Life Insurance Company of New York, & the said Thomas Carney and H. W. Gillett and , jointly and severally, bind themselves, and the

heirs, executors, and administrators of the said Thomas Carney & H W. Gillett and , firmly by these presents.

In witness whereof the Mutual Life Insurance Company of New York has caused the name of their vice-president to be signed hereto, and seal to be affixed, and the said Thomas Carney, H. W. Gillett, and , have hereunto set their hands this 24th day of Nov., A. D. 1869.

The condition of this obligation is that, whereas the said Mary Terry has brought a suit in the district court of Douglas , in the State of Kansas, by filing her petition in said court, on the 5th day of October, A. D. 1869, against the Mutual Life Insurance Company of New York, to recover the sum of two thousand dollars, with interest; and
17 whereas the said Mutual Life Insurance Company have, on the day of the date hereof, filed their petition in said court, praying that the said suit be removed into the next term of the circuit court of the United States for the district of Kansas, to be held in said district:

Now, if the said Mutual Life Insurance Company, defendant, shall and do enter into said circuit court on the first day of its session copies of all process, pleadings, depositions, testimony, & the proceedings in said suit, and shall and do then and there enter appearance in s'd circuit court in said suit, and do such other appropriate acts as by any act of Congress are required to be done upon the removal of a suit from a State court into a circuit court of the United States, then the above obligation is to be and become null and void; otherwise it is to remain in full force and effect.

[L. S.] RICHARD A. McCURDY.
(Bond of)
THO'S CARNEY.
H. W. GILLETT.

Witness as to signature of Tho's Carney & H. W. Gillett:
GEO. W. NELLES.

The following affidavits were endorsed on said bond, to wit:

18 STATE OF NEW YORK,
*City and County of New York, ss:*

On the twenty-fifth day of October, eighteen hundred and sixty-nine, before me came Richard A. McCurdy, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of New York, and is vice-president of the Mutual Life Insurance Company of New York, who are described in, and who executed the foregoing instrument; that the seal thereto affixed is the corporate seal of the said company, and was so affixed by their authority.

[L. S.] WILLIAM G. DAVIES,
*Notary Public in and for said City and County of New York, State aforesaid.*

STATE OF KANSAS, *Leavenworth County, ss:*

Be it remembered that, on this 3d day of November, A. D. 1869, personally appeared before me, the undersigned, a notary public for the county and State aforesaid, Thomas Carney and H. W. Gillett, who are personally known to me to be the identical persons who executed
19 the within instrument, as sureties, and duly acknowledged the execution of the same.

In testimony whereof I have hereunto affixed my hand and seal the year and day last above written.

[L. S.] CHA'S A. BIRNIE,
*Notary Public.*

STATE OF KANSAS, *Leavenworth County, ss:*

Thomas Carney and H. W. Gillett, the sureties on the *written* bond, being first duly and severally sworn, do each for himself depose and say that he is a resident of the city of Leavenworth, county and State aforesaid, and that he is a householder and freeholder therein, and that he is worth the sum of four thousand dollars over and above all his debts and liabilities, exclusive of property which may be exempt from execution under the laws of Kansas.

THO'S CARNEY.
H. W. GILLETT.

Subscribed in my presence and sworn to before me this 3d day of November, A. D. 1869.

[L. S.] CHA'S A. BIRNIE,
*Notary Public.*

Afterwards, to wit, on the 2nd day of December, A. D. 1869,
20 the approval of the judge of this court was endorsed on said bond, and is as follows, to wit:

Approval.

OWEN A. BASSETT,
*Judge of the Fourth Judicial District in the State of Kansas.*

LAWRENCE, KANSAS, *Dec. 2nd*, 1869.

Afterwards, to wit, on the 24th day of November, A. D. 1869, at the November term of the district court of Douglas County, Kansas, among others, the following proceedings were had, to wit:

MARY TERRY, PL'FF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, def't. } 1391. Civil action.

Now comes the said plaintiff, by her attorneys, Riggs, Nevison & Foote; also comes the said defendant, by its attorneys, Burleigh, Hopkins & Francis, and Shannon & Shannon.

Thereupon the said defendant, by its said attorney, moved the court te remove this cause into the next term of the circuit court of the United States for the district of Kansas, to be held in said district, on
21 the ground that said defendant was, at the time of the commencement of this action, and ever since has been, and still is, a corporation, duly organized under the laws of the State of New York, and that the matter in dispute in this action exceeds the sum of five hundred dollars, exclusive of costs; and, in support of said motion, said defendant, by its said attorneys, shows to the court that it has filed its petition, affidavit, and undertaking for a removal to said circuit court of the said cause, and that said affidavit was duly subscribed and sworn to by Charles F. Mills, of St. Louis, Missouri, the duly authorized general agent and manager of the said defendant for the States of Missouri & Kansas.

Whereupon said motion came regularly on to be heard upon the evidence submitted, and the arguments of counsel for the said defendant, as well as the said plaintiff; and the court, after having heard the evidence and the arguments of counsel, and after due consideration, doth order that the motion be, and the same is hereby, overruled; to which

ruling of the court the said defendant, by its said counsel, then and there duly excepted. It is further ordered by the court on motion of
22 said defendant, by its said attorneys, that the said defendant have leave to file an amended answer herein in five days from the date hereof, upon the payment of the costs of filing such amended pleading.

Afterwards, to wit, on the 2nd day of December, A. D. 1869, the following affidavit of George W. Nellis, for a removal, was filed in the office of the clerk of said court, and is in words as follows, to wit:

*Affidavit for removal.*

STATE OF KANSAS,
*Fourth Judicial District, Douglas County.*

In the district court in & for said county.

MARY TERRY, PLAINTIFF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, defendant.

STATE OF KANSAS,
*City & County of Leavenworth, ss:*

George W. Nelles, of lawful age, being first duly sworn, doth depose and say that he is agent in the State of Kansas of the defendant above-named, and duly qualified and authorized under the laws of the
23 said State to act as such agent; that he has read the foregoing and annexed statement and petition of said defendant, and knows the contents thereof & that the same are true. Affiant further says that the amount involved in said action and matter is over five hundred dollars exclusive of costs; and that he has reason to and does believe that from prejudice and from local influence, said defendant will not be able to obtain justice in the above-named district of the fourth judicial district of the State of Kansas.

GEO. W. NELLIS.

Subscribed in my presence and sworn to before me this 26th day of November, A. D. 1869.

[L. S.] CHA'S A. BIRNIE,
*Notary Public.*

Afterwards, to wit, on the 2nd day of December, A. D. 1869, the following affidavit of Fred. S. Winston, was filed in the office of the clerk of said court, and is in words as follows, to wit:

MARY TERRY
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York.

24 STATE OF NEW YORK,
*City & County of New York, ss:*

Frederick S. Winston, of said city, being duly sworn, says: That he is the president of the Mutual Life Insurance Company of New York; that

said company is a corporation created by the laws of the State of New York, and located and doing business in the city of New York; and that said corporation is a citizen of the State of New York. That the above action has been commenced in the district court of the State of Kansas, and is now pending in Douglas County, in said State. That the plaintiff is a citizen of the said State of Kansas, and that issue has been joined in said action. That the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

And this deponent further saith that he has reason to believe, and does believe that, from prejudice or local influence, the said company will not be able to obtain justice in such State court. And this deponent prays that the said action and all proceedings therein may be removed into the circuit court of the United States. And further saith not.

25 F. S. WINSTON.

Sworn and subscribed to this 26th day of November, A. D. 1869, at the city of New York, before me.

GEORGE W. COLLES,
*Notary Public, Com'r for Kansas in N. Y.*

STATE OF NEW YORK,
*City and County of New York, ss:*

This is to certify that, on this 26th day of November, A. D. 1869, before me, a commissioner for the State of Kansas, acting in New York, personally appeared Frederick S. Winston, who is known to me, and who is the affiant in the foregoing affidavit, who, being by me duly sworn according to law, on his oath says that all contained therein is true; and the said Frederick S. Winston, in my presence, did also subscribe the same.

In witness whereof I have hereunto set my hand and the seal of my office, on the day and year first above written.

[L. S.] GEORGE W. COLLES,
*Commissioner for Kansas in New York.*

Afterwards, to wit, on the 2nd day of December, A. D. 1869,
26 at the November term of said court, among other, the following proceedings were had:

MARY TERRY, PLAINTIFF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, def't. } Civil action.

Now, this day came the said plaintiff, by Riggs, Nevison and Foote, her attorneys, and came also the said defendant, by Shannon & Shannon, its attorneys, and thereupon the said defendant moved the court upon the petition heretofore filed herein, and, before the final hearing of this suit, for an order of removal of the same into the next circuit court of the United States in and for the district of Kansas. And thereupon the court, after hearing said petition and the affidavits of George W. Nelles, the duly appointed agent of the said defendant for the State of Kansas, and also the affidavit of Frederick P. Winston, president of the said defendant; and the said defendant having offered and executed to the said plaintiff good and sufficient surety, which was accepted by the

court, for its entering in said circuit court of the United States on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in the above case, doth
27 order that no further proceedings be had in the above suit in this court, and that the same be transferred to the said circuit court of the United States in and for the district of Kansas, in pursuance with the act of Congress in such case made and provided.

To which ruling of the court the said plaintiff there and then excepted.

STATE OF KANSAS, *County of Douglas, ss:*

I, B. D. Palmer, clerk of the district court in and for the county and State aforesaid, do hereby certify that the above and foregoing are true and correct copies of all process, pleadings, affidavits, and all other proceedings had by said court in the case of Mary Terry against The Mutual Life Insurance Company of New York, as the same appear of record and now on file in my office.

In witness whereof I have hereunto set my hand and the seal of said court this 7th day of March, A. D. 1870.

[L. S.] B. D. PALMER,
*Clerk of the Dist. Court.*

28 (Endorsed:) No. 220. Mary Terry vs. The Mutual Life Insurance Company of New York. Transcript. Filed May 19, 1870. A. S. Thomas, clerk.

And, on this day, to wit, May 19th, 1870, came the said plaintiff, by her attorneys, and filed in the clerk's office of the circuit court of the United States for the district of Kansas her petition in the said entitled cause; which said petition is in the words and figures following, to wit

*Petition.*

In the circuit court of the United States in and for the district of Kansas.

MARY TERRY, PLAINTIFF,
*against*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, defendant.

The said plaintiff says that she is, and for a long time prior to the commencement of this action has been, a citizen of the State of Kansas; and that the said defendants are a corporation duly organized under the laws of the State of New York, and situated, residing, and doing
29 business in said State of New York; and that the amount in controversy in this action, and for which this suit is brought, exceeds the sum of five hundred dollars, as will hereinafter more fully appear.

The said plaintiff further says that, on the 22nd day of July, A. D. 1867, at the city of New York, in the State of New York, in consideration of the payment by the plaintiff to the defendants of the premium of $92.84, annually, during the life of one George Terry, who was then the husband of the said plaintiff, the defendants, by their agents duly authorized thereto, made their policy of insurance in writing, on the life of said George Terry, for the sole use of the said plaintiff, who was then the wife of the said George Terry, in the sum of $2,000, and then delivered the said policy of insurance to the said plaintiff, of which policy the following is a copy:

"No. 66429.

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

"Age, 50 years.] [Amount, 2,000.

"Annual premium, $92.84.

"In consideration of the representations made to them in the application for this policy, and of the sum of ninety-two dollars and eighty-four cents, to them duly paid by Mary Terry, wife of George Terry, (manufacturer,) and of the annual payment of a like amount
30 on or before the 22nd day of July, in every year during the continuance of this policy, do assure the life of the said George Terry, of Lawrence, in the county of Douglas, State of Kansas, for the sole use of his said wife, in the amount of two thousand dollars, for the term of his natural life.

"And the said company do hereby promise and agree to pay the amount of the said insurance, at their office in the city of New York, to the assured for her sole use, if living, in conformity with the statute, and if not living, to her children or their guardian for their use, in sixty days after due notice and proof of the death of the said party whose life is hereby insured, the balance of the year's premium, if any, being first deducted therefrom.

This policy is issued and accepted by the assured upon the following express conditions and agreements:

"1st. If the said person whose life is hereby insured shall pass or remain beyond the settled limits or protection of the Government of the United States, (excepting into the settled limits of the British Provinces,) or west of the 109th degree of west longitude, or north of the 50th degree of north latitude, or, between the 1st of July and the 1st of Novem-
31 ber, south of the parallel of 36° 30′ of north latitude; or shall enter upon a voyage upon the high seas, or shall be personally engaged in blasting, mining, submarine operations, or the production of highly inflammable or explosive substances, or in working or managing a steam-engine in any capacity, or as a mariner, engineer, fireman, conductor, or laborer in any capacity, upon service on any sea, sound, inlet, river, lake, or railroad, or enter into any military or naval service whatsoever, (excepting into the militia when not in actual service,) without the consent of this company, in each or either of the foregoing cases, previously given in writing; or if he shall die by his own hand, or in consequence of a duel, or of the violation of the laws of any nation, state, or province; or if he shall aid or abet any insurrection against the State of New York, or the United States, or perform any labor or service, civil or military, in aid of such insurrection; or if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case, this policy shall be null and void.

32 "2nd. If the said premiums shall not be paid on or before the days mentioned for the payment thereof, at the office of the company in the city of New York, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president or secretary, then in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine.

"3d. In every case when this policy shall cease and determine, or become or be null and void, all payments thereon shall be forfeited to this company.

"4th. If this policy should be assigned or held as security, written notice shall be given to this company, and due proof of interest produced with the proofs of death.

"In witness whereof the said The Mutual Life Insurance Company of New York, have, by the president and secretary, signed and delivered this contract this twenty-second day of July, one thousand eight hundred and sixty-seven.

"RICHARD A. McCURDY,
" *Vice-President.*

"JNO. M. STEWART, *Secretary.*"

[Fifty-cents United States internal-revenue stamp—conveyance—cancelled.]

The said plaintiff further says that, up to the time of the death of the said George Terry, all premiums accrued upon said policy
33 were duly paid, and that said policy of insurance was in all respects in full force and virtue; that, on the 20th day of April, A. D. 1869, at Lawrence, in the county of Douglas, and State of Kansas, said George Terry died, which death was not caused by the said George Terry's own hand, nor in consequence of a duel, nor in consequence of the violation of the laws of any nation, state, or province. The said plaintiffs further says that the said George Terry did not, on or after the 22nd day of July, A. D. 1867, pass or remain beyond the settled limits or the protection of the Government of the United States, (except into the settled limits of the British provinces,) or west of the 109th degree of west longitude, or north of the 50th degree of north latitude, nor between the 1st of July and the 1st of November, south of the parallel of 36° 30′ of north latitude; nor did he, on or after the 22nd day of July, 1867, enter upon a voyage upon the high seas, nor personally engage in blasting, mining, submarine operations, nor in the production of highly inflam'able or explosive substances, nor in working or managing a steam-engine in any capacity, nor as a mariner, engineer, fireman, conductor, or laborer in any capacity upon service on any
34 sea, sound, inlet, river, lake, or railroad; nor did he, on or after said date, enter any military or naval service whatsoever; nor did he, on or after said 22nd day of July, 1867, aid or abet any insurrection against the State of New York or the United States, or perform any labor or service, civil or military, in aid of any such insurrection; nor was any statement or declaration made in the application for said policy untrue.

The said plaintiff further says that she duly performed all the conditions of said policy of insurance on her part, and the plaintiff, more than sixty days before the commencement of this action, to wit, on the 28th day of June, A. D. 1869, at the defendant's office, gave to the defendants, due notice and proof of the death of said George Terry, as aforesaid, and duly demanded payment of the said sum of $2,000, but no part thereof has been paid, and the defendants are indebted to the plaintiff thereon in the sum of $2,000 with interest thereon from the 28th day of August, A. D. 1869, for which he asks judgment.

RIGGS, NEVISON, & FOOTE,
*Attorneys for Plaintiff.*

(Endorsed:) No. 220. Mary Terry vs. The Mutual Life In-
35 surance Company of New York. Petition filed May 19, 1870, A. S. Thomas, clerk. Riggs, Nevison, & Foote, att'ys for plaintiff.

And on this day, to wit, May 31, 1870, came the said defendant, by its attorneys, and filed in the clerk's office of the circuit court of the United States for the district of Kansas, its answer in the said entitled cause, which said answer is in the words and figures following, to wit:

UNITED STATES OF AMERICA:

United States district court for the district *court of the district* of Kansas.

MARY TERRY, PL'FF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, def't.

1st. The defendants, for answer to the petition of the said plaintiff, says that they admit the execution of the policy of insurance mentioned in the plaintiff's said petition, but deny each and every other allegation therein contained.

2nd. And for a further answer to the petition of the said plaintiff, the said defendants say that the said George Terry named in the said policy of insurance, on or about the 20th day of April, A. D. 1869, at Lawrence, in the said county of Douglass, and State of Kansas, did willfully
36 take his own life, and said defendants aver and say that he did then and there come to his death by his own hand, and this said defendants are ready to make appear.

SHANNON & SHANNON, & HOPKINS,
*Att'y for Def't.*

(Endorsed:) No. 220. Mary Terry vs. The Mutual Life Insurance Company of New York. Answer. Filed May 31, 1870. A. S. Thomas, clerk. Shannon & Shannon, & Hopkins.

And on this day, to wit, June 27th, 1870, came the said plaintiff, by her attorneys, and filed in the clerk's office of the circuit court of the United States for the district of Kansas, her reply in the said entitled cause; which said reply is in the words and figures following, to wit:

*Reply.*

In the circuit court of the United States for the district of Kansas.

MARY TERRY, PLAINTIFF,
*against*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, defendant.

The said plaintiff, for reply to the answer of the said defendant, says that it is not true, and she therefore denies that the said George
37 Terry, on or about the 20th day of April, A. D. 1869, or at any other time, at Lawrence, or at any other place, did wilfully take his own life, or that he came to his death by his own hands.

The said plaintiff further says that the said George Terry, on the 20th day of April, A. D. 1869, was, and for a long time prior thereto had been, insane, and incapable of discovering between right and wrong, and that the said George Terry, while so insane, did take and swallow

poison, which said poison did cause the death of the said George Terry on or about the 20th day of April, 1869.

That when said George Terry did take and swallow said poison which caused his death he was of unsound mind and wholly unconscious of the said act. Wherefore said plaintiff asks judgment as prayed for in said petition.

RIGGS, NEVISON & FOOTE,
*Attorneys for Plaintiff.*

(Endorsed:) No. 220. Mary Terry vs. The Mutual Life Ins. Co. of N. Y. Reply. Filed June 27, 1870. A. S. Thomas, clerk. Riggs, Nevison & Foote, att'ys.

And afterwards, at a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at
38 the city of Topeka, in said district, on Monday, the 28th day of November, A. D. 1870—present, the Hon. John F. Dillon and the Hon. Mark W. Delahay, judges of said court—at which term of said court, on the 30th day of November, A. D. 1871, among other proceedings, the following were had, and appear of record in words and figures following, to wit:

WEDNESDAY, *Nov.* 30, 1870.

MARY TERRY
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York. } 220.

It is ordered by the court that this case be continued to the next term of this court, neither party appearing when called for trial.

And now this day, to wit, May 25th, 1871, came the said defendant, by its attorney, and filed in the clerk's office of the circuit court of the United States for the district of Kansas, its rejoinder in the said entitled cause, which said rejoinder is in the words and figures following, to wit:

39 In the circuit court of the United States for the district of Kansas.

MARY TERRY, PL'FF,
*vs.*
THE MUTUAL LIFE INSURANCE CO. OF NEW York, def't.

And the said def't now comes, and, as to the replication of the said plaintiff to the answer of said def't, says that the said def't denies that the said George Terry, at the time of taking the said poison in said replication mentioned, and at the time of his said death, was of insane mind and unconscious of the said act.

WILSON SHANNON,
*Att'y for Def't.*

I agree that the above may be filed in this case.
May 25, 1871.

W. W. NEVISON,
*Att'y for Pl'ff.*

(Endorsed:) No. 220. Mary Terry vs. The Mutual Life Insurance Co. of N. York. Rejoinder. Filed May 25, 1871. A. S. Thomas, clerk.

And afterwards, to wit, at a term of the circuit court of the United States of America, in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 22nd day of May, A. D. 1871—

40 Present, the Hon. John F. Dillon, and the Hon. Mark W. Delahay, judges of said court—at which term of said court, on the 25th day of May, A. D. 1871, among other proceedings, the following were had, and appear of record in words and figures following, to wit:

THURSDAY, *May 25th*, 1871.

MARY TERRY
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York. } 220.

Now comes the plaintiff, by Riggs, Nevison & Foote, her attorneys, and the said defendant, by Burleigh, Hopkins, & Francis, & Shannon, its attorneys, to try the issue joined herein. Come a jury, to wit: B. L. Baldridge, Asher Chase, A. W. Bayers, A. W. Hays, Geo. C. Smith, J. H. Mason, B. McKee, M. L. Devore, L. J. Early, John Hosick, Hiram McAllister, W'm Inman, twelve good and lawful men of the body of the district of Kansas, who, being duly empannelled and sworn to well and truly try the issue joined herein and matters submitted to them, and a true verdict give according to the law and the evidence, and, after hearing the evidence and the arguments of counsel, are admonished

41 of their duties herein. And the further hearing of this case is postponed until to-morrow morning.

FRIDAY, *May* 26, 1871.

MARY TERRY, PLAINTIFF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, defendant. } 220.

Now comes the said plaintiff, by Riggs, Nevison & Foote, her attorneys, and also the said defendant, by Burleigh, Hopkins & Francis, its attorneys, and the jury empannelled herein being called and being all present, after hearing the instruction and charge of the court, retire under charge of a sworn bailiff for consideration; and afterwards come into court under charge of their sworn bailiff, and return the following verdict: "We, the jury, find verdict for the plaintiff, and assess the damages of the pl'tiff at $2,245. A. W. Hayes, foreman."

It is therefore considered and adjudged by the court that the said Mary Terry, plaintiff, have and recover of and from the said defendant, The Mutual Life Insurance Company of New York, the said sum

42 of two thousand two hundred and forty-five dollars, and her costs in this case expended, taxed at $ , and for which judgment is hereby rendered, and that execution issue therefor.

And the said defendant thereupon filed its motion to set aside the verdict and judgment of the court thereon, for reason stated in its said motion on file, and the said defendant withdraws its motion for a new trial, and to set aside the verdict and judgment of the court.

MONDAY, *May* 29, 1871.

MARY TERRY, PL'T'FF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, def't. } 220.

And now comes the said defendant, and presented its certain bill of exceptions taken on the trial of this cause, and the same is allowed and signed, and ordered to be placed on file with the pleadings, and made a part of the record in this case.

Which said bill of exceptions is in words and figures following, to wit:

43 UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States, for the district of Kansas.
May term, A. D. 1871.

MARY TERRY, PLAINTIFF,
*vs.*
THE MUTUAL LIFE INSURANCE COMPANY OF New York, defendant.

Be it remembered that, on the trial of this cause, in the circuit court of the United States, in and for the district of Kansas, at the May term, in the year of our Lord one thousand eight hundred and seventy-one, evidence had been given to the jury by the plaintiff, tending to show that the said George Terry, at the time he took the poison, in the pleadings mentioned, was insane; and also evidence had been given by the defendant, tending to show that the said George Terry, at the time he committed self-destruction; was sane and capable of knowing the consequence of the act he was about to commit. The counsel for the defendant asked the court to instruct the jury as follows:

44 First. If the jury believe, from the evidence in the case, that the said George Terry destroyed his own life; and that, at the time of self-destruction he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case.

Second. That it the jury believe, from the evidence, that the self-destruction of the said George Terry was intended by him, he having sufficient capacity, at the time, to understand the nature of the act which he was about to commit and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his action.

Third. The fact that George Terry destroyed his own life is not evidence "per se" of insanity.

Fourth. The plaintiff in this case has the affirmative of the issue, and must shew, by a preponderance of evidence that said Terry, at the time he committed self-destruction, was insane and not capable of
45 knowing the nature of the act he was about to commit and the consequences thereof.

Fifth. That if the jury believe that at the time the said George Terry took and swallowed the said poison in the plaintiff's replication set forth and which caused his death, was not wholly unconscious of the said act, but knew what he was doing and the consequence of his swallowing said poison, then, and in that case, the plaintiff cannot recover on the policy declared on.

Which instructions and each one of said instructions the court refused to give to the jury, but the court did charge the jury:

"It being agreed that deceased destroyed his life by taking poison, it is claimed by defendant that he 'died by his own hand' within the meaning of the policy, and they are therefore not liable.

"This is so far true that it devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy.

"It is not every kind or degree of insanity which will so far
46 excuse the party taking his own life as to make the company insuring liable.

"To do this the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

"If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand there is no presumption of law prima facie or otherwise that self destruction arises from insanity, and if you believe from the evidence that the decedent although excited, or angry, or distressed in mind, formed the determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy.

"To which refusal and charge, and every part of said charge
47 said defendant at the time excepted, and prayed that his bill of exceptions in that behalf might be allowed, which is accordingly done, and, upon his motion, ordered to be made a part of the record in this case.

"SAM. F. MILLER." [SEAL.

(Endorsed:) No. 220. Mary Terry vs. The Mutual Life Insurance Company of New York. Bill of exceptions. Filed May 29th, 1871. A. S. Thomas, clerk.

And on this day, to wit, the thirtieth day of May, A. D. 1871, came the said defendant, by its attorneys, and filed in the clerk's office its appeal bond in the said entitled cause; which said appeal bond is in the words and figures, following, to wit:

Know all men by these presents that we, The Mutual Life Insurance Company of New York as principal, and George W. Veall and John Guthrie as sureties, are held and firmly bound unto Mary Terry in the just and full sum of five thousand five hundred dollars, to be paid to the said Mary Terry, her executors, administrators, or assigns; to
48 which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly

by these presents, sealed with our seals, and dated this thirtieth day of May, in the year one thousand eight hundred and seventy-one.

Whereas the Mutual Life Insurance Company of New York above-named, hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered against it in the circuit court of the United States for the district of Kansas at the May term thereof, in the year one thousand eight hundred and seventy-one, in favor of said Mary Terry:

Now, therefore, the condition of this obligation is such, that if the Mutual Life Insurance Company of New York above-named, shall prosecute its said writ of error to effect and answer all damages & costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force & virtue.

GEO. W. VEALL.
JOHN GUTHRIE.

Sealed & delivered in the presence of—
JOHN H. PUTNAM.

Approved, May 30, 1871.

SAM. F. MILLER.

49 STATE OF KANSAS,
*County of Shawnee:*

Be it remembered that, on this thirtieth day of May, A. D. one thousand eight hundred and seventy-one, before me, the undersigned, a notary public in and for the county & State aforesaid, came George W. Veall and John Guthrie, to me known to be the same persons described in, and who executed the foregoing instrument, and such persons duly acknowledged the execution of the same.

In testimony whereof I have hereunto signed my name and affixed my official seal the day and year last above written.

[SEAL.] JOHN H. PUTNAM,
*Notary Public Shawnee Co., Kansas.*

50 STATE OF KANSAS,
*County of Shawnee, ss:*

George W. Veall, being first duly sworn, doth depose and say that he is a resident of Topeka, & a freeholder & a householder therein, and worth the sum of five thousand five hundred dollars over and above all his debts and liabilities, and exclusive of property exempt from execution either under the laws of the State of Kansas or of the United States.

GEO. W. VEALL.

Subscribed in my presence, & sworn to before me a notary public in and for the county & State aforesaid, this 30th day of May, in the year one thousand eight hundred & seventy-one.

[SEAL.] JOHN H. PUTNAM,
*Notary Public.*

STATE OF KANSAS,
*County of Shawnee, ss:*

John Guthrie, being first duly sworn, doth depose and say that he is a resident of Topeka, and a householder therein, and worth the sum of

five thousand five hundred dollars over and above all his debts
51 and liabilities, and exclusive of property exempt from execution either under the laws of the State of Kansas or of the United States.

JOHN GUTHRIE.

Subscribed in my presence & sworn to before me, a notary public in & for the county & State aforesaid, this 30th day of May, in the year one thousand eight hundred and seventy-one.

[SEAL.] JOHN H. PUTNAM.

(Endorsed :) No. 220. Mutual Life Insurance Company, pl'ffs in error, vs. Mary Terry, defendant in error. Bond on writ of error. Filed May 30, 1871. A. S. Thomas, clerk.

52 UNITED STATES OF AMERICA,
*District of Kansas, ss:*

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify the foregoing transcript to be a true, full, and perfect copy from the record of all the proceedings had in said court in the case of Mary Terry, plaintiff, against The Mutual Life Insurance Company of New York, defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Topeka, in said district, this 14th day of October, A. D. 1871.

[SEAL.] A. S. THOMAS, *Clerk.*

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Kansas, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Mary Terry and The Mutual Life Insurance Company of New York, a manifest error hath happened to the great damage of The Mutual Life Insurance Company of New York, aforesaid, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be there and then held, that, the record & proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws & customs of the United States
54 should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court the 30th day of May, in the year of our Lord one thousand eight hundred and seventy-one; and A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas.

Issued at the office of the said clerk, in the city of Topeka, with the seal of said circuit court hereto affixed, dated as aforesaid.

[SEAL.] A. S. THOMAS, *Clerk.*

Allowed by Sam. F. Miller, one of the judges of the circuit court of the United States for the district of Kansas, this 30th day of May, in in the year of our Lord one thousand eight hundred and seventy-one.

55 (Indorsed:) No. 220. Mary Terry, pl'ff, vs. The Mutual Life Insurance Company of New York, defendant. (Original.) Writ of error from Supreme Court of the United States of America to circuit court of the United States for the district of Kansas. Filed May 30, 1871. A. S. Thomas, clerk.

56 UNITED STATES OF AMERICA, *ss:*

To MARY TERRY, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein the Mutual Life Insurance Company of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sam. J. Miller, one of the judges of the circuit court of the United States for the district of Kansas, this 30 day of May, A. D. 1871.

SAM. F. MILLER,
*One of the Judges of the Circuit Court of the United States for the District of Kansas.*

57 STATE OF KANSAS, *Douglas County, ss:*

Personally appeared before me, Osbun Shannon, a notary public in and for said county of Douglas, and State of Kansas, Wilson Shannon, jr., who, being by me first duly sworn, deposeth and saith that he served W. W. Nevison, esq., the attorney for the said Mary Terry, defendant in error, with the above notice, by delivering to him in person a true copy of the above citation, in the city of Lawrence, in said Douglas County on the 5th day of June, A. D. 1871.

WILSON SHANNON, JR.

Subscribed & sworn to before me this 5th day of June, A. D. 1871.
[SEAL.] OSBUN SHANNON,
*Notary Public.*

(Indorsed:) No. 220. Mary Terry, pl'ff, vs. The Mutual Life Insurance Company of New York, defendant. Citation. Filed June 6, 1871. A. S. Thomas, clerk.

58 UNITED STATES OF AMERICA:

In the Supreme Court of the United States of December term, in the year of our Lord one thousand eight hundred & seventy-one.

THE MUTUAL LIFE INSURANCE COMPANY OF New York, plaintiff in error,
*vs.*
MARY TERRY, DEFENDENT IN ERROR. } In error.

Afterwards, to wit, on the first Monday of December, in the same term, before the justices of the Supreme Court of the United States, at

the Capitol, in the city of Washington, comes The Mutual Life Insurance Company of New York, by Henry E. Davies, Shannon and Shannon, and Burleigh, Hopkins & Francis, its attorneys, & says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the declaration aforesaid & the matters therein contained are not sufficient in law for the said Mary Terry to have or maintain her aforesaid action thereof against the said The Mutual Life Insurance Company of New York.

59 Second. There is also error in this, to wit: That said circuit court of the United States for the district of Kansas, refused to give to the jury the instructions asked by the said insurance company, defendent, by its counsel.

Third. There is also error in this, to wit: In the said court refusing to instruct the jury as asked by the said defendent by its counsel, that, "If the jury believe from the evidence in the case that the said George Terry destroyed his own life, and that at the time of self-destruction he had sufficient capacity to understand the nature of the act he was about to commit, & the consequences which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case."

Fourth. There is also error in this, to wit: In the court refusing to instruct the jury as asked by the said defendent, by its counsel; "That, if the jury believe that the self-destruction of the said George Terry, was intended by him, he having sufficient capacity at the time to

60 understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility and rendered him, to a certain extent, irresponsible for his action."

Fifth. There is also error in this, to wit: That the court refused to instruct the jury as asked by the said defendent, by its counsel, that "The fact that George Terry destroyed his own life is not evidence per se of insanity."

Sixth. There is also error in this, to wit: That the court refused to instruct the jury as asked by the said defendent by its counsel, that "The plaintiff in this cause has the affirmative of the issue and must show by a preponderence of evidence that said Terry, at the time he committed self-destruction was insane and not capable of knowing the nature of the act he was about to commit and the consequences thereof."

Seventh. There is also error in this, to wit: That the court re-

61 fused to charge the jury as asked by the said defendent, by its counsel, "That if the jury believe that, at the time the said George Terry took and swallowed the said poison, in the plaintiff's replication set forth, and which caused his death, was not wholly unconscious of said act, but knew what he was doing, & the consequences of swallowing said poison, then, & in that case, the plaintiff cannot recover on the policy declared on."

Eighth. There is also error in this, to wit: in said court giving the instructions & charges it gave to the jury.

Ninth. There is also error in this, to wit: That the court instructed and charged the jury as follows: "It being agreed that deceased destroyed his life by taking poison, it is claimed by defendent that he 'died by his own hand,' within the meaning of the policy and they are there-

fore not liable. This is so far true that it devolves on the plaintiff to prove such insanity on the part of the decedent existing at the time he took the poison as will relieve the act of taking his own life from
62 the effect, which by the general terms used in the policy, self-destruction was to have, viz, to avoid the policy."

Tenth. There is also error in this, to wit: That the court instructed the jury as follows: "It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this the act of self destruction must have been the consequence of this insanity and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing."

Eleventh. There is also error in this, to wit: That the court charged and instructed the jury that, "If he was impelled to the act by an insane impulse, which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overthrown that he could not exercise his reasoning faculties on the act he was about to do, the company is liable."

Twelfth. There is also error in this, to wit: That the court charged & instructed the jury as follows: "On the other hand there
63 is no presumption of law prima facia or otherwise that self destruction arises from insanity, and if you believe, from the evidence, that the decedent, although excited or angry or distressed in mind, formed his determination to take his own life because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand, within the meaning of the policy."

Thirteenth. There is also error in this, to wit: That, by the record aforesaid it appears that the judgment aforesaid given was given for the said Mary Terry against The Mutual Life Insurance Company of New York aforesaid, whereas, by the law of the land, the said judgment ought to have been given for The Mutual Life Insurance Campany of New York aforesaid, against the said Mary Terry aforesaid. And The Mutual Life Insurance Company of New York aforesaid prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing; and that it, the said plaintiff in error, may be restored to all things which it hath lost by occasion of the said judgment, &c.

HENRY E. DAVIES,
SHANNON & SHANNON &
BURLEIGH, HOPKINS & FRANCIS,
*Of Counsel & Attorneys for Plaintiff in Error.*

(Indorsed:) No. 220. The Mutual Life Insurance Co. of New York pl'ff in error, vs. Mary Terry, def't in error. Assignment in error Filed Sept. 15, 1871. A. S. Thomas, clerk.

The Mutual Life Insurance Company of New York, plaintiff in error, vs. Mary Terry, def'd't in error. Transcript.

(Indorsement on cover:) No. 401. The Mutual Life Insurance Company of New York, plaintiff in error, vs. Mary Terry. Kansas C. C. U. S. Filed 23d November, 1871.

# U. S. Supreme Court.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK,

*Plaintiffs in Error.*

*against*

MARY TERRY,

*Defendant in Error.*

# BRIEF

FOR THE MUTUAL LIFE INSURANCE CO. OF NEW YORK,

***Plaintiffs in Error.***

HENRY E. DAVIES.
JULIEN T. DAVIES,
*Of Counsel for Plaintiffs in Error.*

NEW YORK:

# Supreme Court

## OF THE UNITED STATES.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
*Plaintiff in Error.*
*against*
MARY TERRY,
*Defendant in Error.*

*Brief for The Mutual Life Insurance Company of New York, Plaintiff in Error.*

### STATEMENT OF FACTS.

This action was begun by Mary Terry, a citizen of the State of Kansas, defendant in error, against The Mutual Life Insurance Company of New York, plaintiff in error, a corporation organized under the laws of the State of New York, and having an agency in the State of Kansas, by a petition, filed October 5, 1869, in the District Court of Douglass County, Kansas. The action was brought upon a policy of life insurance issued by the plaintiff in error, to the defendant in error, by which, in consideration of certain representations, and the annual premium of $92.84, the said company insured the the life of one George Terry, the husband of Mary Terry, in the sum of $2,000, for the term of his natural life, and agreed to pay the amount of insurance, with accumulations, to the said Mary Terry, sixty days after due notice and proof of death of the said George Terry. (Page

12 of Transcript, folio 29.) The policy was issued and accepted by the said Mary Terry, under certain express conditions and agreements, one of which conditions and agreements was the following:

"If the said person whose life is hereby insured *shall die by his own hand*, this policy shall be null and void." (Folio 31.)

The action was removed to the Circuit Court of the United States in and for the district of Kansas, on the petition of the plaintiff in error, before answering, and the defendant in error filed her petition in said last named Court, on the 19th day of May, 1870 (folio 28), in which she alleged that on the 20th day of April, 1869, at Lawrence, in the County of Douglass, and State of Kansas, the said George Terry died, *which death was not caused by the said George Terry's own hand.* (Folio 33).

This allegation the plaintiff in error denied by their answer, by which they in turn maintained that the said George Terry, on the said 20th day of April, 1869, at Lawrence, aforesaid, did wilfully take his own life, and that he did then and there come to his death by his own hand. (Folio 36.)

For reply to this answer the said Mary Terry denied that George Terry, at the said time and place, or at any time and place, wilfully took his own life, or that he came to his death by his own hands, and alleged that the said George Terry, on the 20th day of April, 1869, and for a long time prior thereto had been insane and incapable of discerning between right and wrong, and that he, while so insane, took and swallowed poison, which poison caused his death on that day, and that when he took and swallowed the poison he was of unsound mind and wholly unconscious of the act. (Folio 37.)

As a replication to the reply, the plaintiff in error denied that at the time of taking poison and at the time of his death, said George Terry was of insane mind and unconscious of the act. (Folio 39.)

The cause was tried before Hon. Samuel F. Miller, Judge of this Court, Hon. John F. Dillon, Circuit Judge, and a jury, on the 25th and 26th days of May, 1871, and resulted in a verdict and judgment for the defendant in error of $2,245 and costs. (Folio 40.) The case is reported in the First of Dillon's Circuit Court Reports, page 403.

The cause comes to this Court on a bill of exceptions that contains only exceptions to the refusals of the learned Judge who tried the cause to submit certain propositions of law contended for by the plaintiff in error, to the jury for their guidance, and to certain portions of his charge. (Folio 43.)

The only conflict in the trial between the parties was as to the sanity or insanity of George Terry. Evidence was given by the plaintiff in the Court below, tending to show that the said George Terry, at the time he took the poison, was insane, and evidence was given on the part of the defendant in the Court below, tending to show that at the time he committed self-destruction he was sane and capable of knowing the consequences of the act he was about to commit. (Folio 43.)

STATEMENT OF ERRORS RELIED UPON BY THE PLAINTIFFS IN ERROR.

*First.*—There is error in this, to wit: That said Circuit Court of the United States, for the District of Kansas, refused to give to the jury the instructions asked by the said insurance company, defendant, by its counsel.

*Second.*—There is also error in this, to wit: In the said Court refusing to instruct the jury, as asked by the said defendant, by its counsel, that, "If the jury believe, from the evidence in the case, that the said George Terry destroyed his own life, and that, at the time of self-destruction, he had sufficient capacity to understand the nature of the act he was about to commit, and the consequences which would result from it, then, and in that

case, the plaintiff cannot recover on the policy declared on in this case."

*Third.*—There is also error in this, to wit: In the Court refusing to instruct the jury, as asked by the said defendant, by its counsel, "That if the jury believe that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial, in the present case, that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action."

*Fourth.*—There is also error in this, to wit: That the Court refused to instruct the jury, as asked by the said defendant, by its counsel, that "The fact that George Terry destroyed his own life is not evidence, *per se*, of insanity."

*Fifth.*—There is also error in this, to wit: That the Court refused to instruct the jury, as asked by the said defendant, by its counsel, that "The plaintiff in this cause has the affirmative of the issue, and must show by a preponderance of evidence that said Terry, at the time he committed self-destruction, was insane, and not capable of knowing the nature of the act he was about to commit, and the consequences thereof."

*Sixth.*—There is also error in this, to wit: That the Court refused to charge the jury, as asked by the said defendant, by its counsel, "That if the jury believe that, at the time the said George Terry took and swallowed the said poison in the plaintiff's replication set forth, and which caused his death, was not wholly unconscious of said act, but knew what he was doing, and the consequences of swallowing said poison, then, and in that case, the plaintiff cannot recover on the policy declared on."

*Seventh.*—There is also error in this, to wit: In said Court giving the instructions and charges it gave to the jury.

*Eighth.*—There is also error in this, to wit: That the Court instructed and charged the jury as follows. "It being agreed that the deceased destroyed his life by taking poison, it is claimed by defendant that he 'died by his own hand,' within the meaning of the policy, and they are therefore not liable. This is so far true, that it devolves on the plaintiff to prove such insanity on the part of the decedent existing at the time he took the poison, as will relieve the act of taking his own life from the effect which by the general terms used in the policy, self-destruction was to have, viz.: to avoid the policy."

*Ninth.*—There is also error in this, to wit: That the Court instructed the jury as follows. "It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of this insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing."

*Tenth.*—There is also error in this, to wit: That the Court charged and instructed the jury that, "If he was impelled to the act by an insane impulse, which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overthrown, that he could not exercise his reasoning faculties on the act he was about to do, the company is liable."

*Eleventh.*—There is also error in this, to wit: That the Court charged and instructed the jury as follows: "On the other hand there is no presumption of law, *prima facie* or otherwise, that self destruction arises from insanity, and if you believe from the evidence that the decedent, although excited or angry, or distressed in mind, formed his determination to take his own life because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy."

*Twelfth.*—There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Mary Terry against The Mutual Life Insurance Company of New York, aforesaid, whereas, by the law of the land, the said judgment ought to have been given for The Mutual Life Insurance Company of New York, aforesaid, against the said Mary Terry, aforesaid.

HENRY E. DAVIES.
JULIEN T. DAVIES.
*Of Counsel and*
*Attorneys for Plaintiff in Error.*

## POINT I.

The policy was to be avoided if the deceased died by his own hand. The question to be considerd is the meaning of this expression, "die by his own hand."

In the production of every physical action that can be said to be a person's own act, there must be three operations.

*First.*—The formation of the intention to act.

*Second.*—The intention to produce a certain result, or the knowledge that such result will be produced by the act.

*Third.*—The execution of the intention by the organ or limb called upon for the service.

Every act in whose performance, then, these operations have a part, must be said to be the act of the doer, *his own act*, and any act not made up of all three of these

factors, or wanting one of them, cannot be properly said to be the act of the hand of the doer.

## POINT II.

The cases arising under policies containing provisions similar to that in the one we are now considering, in which the construction of the words here used or of similar ones have arisen, may be divided into three classes.

1. Cases of self-destruction by accident.

2. Cases of self-destruction by a person laboring under a delirium or frenzy, to such a degree as to be wholly unconscious of the physical nature and consequences of his act.

3. Cases of wilful self-destruction by one wholly sane, or by one partially insane and yet possessing sufficient reason to know the physical nature and consequences of his act.

## POINT III.

In cases of self-destruction by accident, there is no intention to do the act that results in death, and no intention or knowledge that the act will produce death. The death is not, therefore, in the highest sense of the term the act of the self-slayer; he does not die by his own hand, and the company insuring would be liable.

## POINT IV.

Self-destruction by one laboring under a delirium or frenzy to such an extent as to render him incapable of knowing the nature or physical consequences of his own act, should not annul the policy, for the reason that in such an act there would be wanting the intention to produce death by the deed and the knowledge that death would follow the deed, although there might at the same time be present in the diseased mind the intention to perform the action that produced the killing. Whether the self-destroyer were so far insane that his mind possessed no control whatever over his muscles, and his limbs acted like mere machinery, or whether he possessed sufficient mental power to conceive the intention to do the fatal deed, while ignorant of its nature and physical consequences, the act could not be said to be his own and his death to result from his own hand.

## POINT V.

In cases of self-killing by one perfectly sane, all the three elements necessary to make the act that of "the own hand" of the self-destroyer are present. The act of self-destruction by one having sufficient reason to understand the nature and physical consequences of his act, is no less the work of "his own hand." With this degree of reasoning power, the suicide is capable of first, forming the intention to do the fatal act, second, of conceiving the intention to produce death by the act, or of apprehending the fact that death is the immediate result of the act; third, of performing the act with the appropriate physical organ or limb. His mind, although diseased, controls him. He is himself, and governed from within and by a mind that masters him, although debased and weakened by disease.

The rule here contended for is as well settled by authority, both in this country and England, as it is in accord with a logical interpretation and construction of the words of the contract.

This rule was early settled in England, in the leading case of

Borrodaile *vs.* Hunter, 5 Man. & Gr., 639, (44 Eng. Com. L., 335.)

The jury found, "that the deceased voluntarily threw himself from Vauxhall Bridge, with the intention of destroying his life, but at the time of committing the act he was not capable of judging between right and wrong." Upon this verdict a judgment was directed for the defendant that was affirmed by the full Bench.

Erskine, *J.*, in giving judgment said:

"All that the contract required was that the act of self-destruction should be the voluntary and wiful act of a man, having at the time sufficient power of mind to understand the physical nature and consequence of the act, and having the intention to choose his own death."

See further:

Clift *et al*, *vs.* Schabe, 3 Mann. and Gr. and Scott 437 (54 Eng. Com. L., 437).
Dufaur *vs.* Professional Life Ins. Co., 25 Bevan, 602.

Massachusetts has adopted the same rule. In the case of Dean and another, against American Mutual Life Insurance Company (4 Allan, 96), the policy was made void in case the insured die "by his own hands," and it was agreed in the case that the insured caused his own death by cutting his throat with a razor. The plaintiffs offered to prove that the act of killing was the direct result of insanity; that his insanity was what is called suicidal depression, impelling the insured to take his own life, and that suicide is the necessary and direct result of such insanity or disease. The case was reserved on this

offer, and the plaintiffs were nonsuited by the full bench, upon the ground, that "self-destruction was intended by the plaintiff's intestate, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it."

See also:

Cooper *vs.* The Massachusetts Mutual Life Ins. Co., 102 Mass., 227.

The United States Circuit Court of the Western District of Pennsylvania, has adopted the same rule.

Alex. Nimick *et al.*, *vs.* Mutual Life Insurance Company, American Law Register, N. S., Vol. 10, No. 11, page 101.

This action was to recover on a policy containing the words "die by his own hands." The defendants alleged self-destruction by the deceased, which fact was denied by the plaintiff, with the further defence, that the deceased at the time of his death was of unsound mind.

In his charge to the jury, Judge McKennan says: "Insanity is an exceptional condition of the mind, and the legal presumption therefore is, that every one is of sound mind until the contrary is proved by sufficient affirmative evidence.

You will, then, inquire, in the first place, as to the manner in which the assured came to his death. Did he take his own life, or was it taken by others? Was his death voluntary or accidental? If you find that it resulted from his own act, you will then consider the state of his mind as it affected the exercise of his will, and a comprehension of the physical consequences of the act, aside from its moral character."

Speaking of the provision in the policy upon which the case arose, the learned Judge continues:

"They (the words of the policy) are intended to protect the insurer against the consequence of the physical

act of the assured. They refer distinctly to the physical agency by which death may be caused, only by implication quite speculative to the moral sensibility of the agent. Their sense, then, is evidently satisfied by expounding them as describing an act of the assured resulting in his death, as an intended consequence of it, irrespective of his understanding of its moral nature."

See also:

Haltman *vs.* Keystone Ins. Co., 25 Penn., 466.
Administrators of Billmeyer *vs.* Guardian Life Ins. Co. of New York, U. S. Cir. Ct., Western District of Penn., June, 1872. (Not reported.)

The United States Circuit Court for Connecticut has, in a recent case, adopted the rule here contended for.

Gay *vs.* Union Mutual Life Insurance Company of New York, 9 Blatch., p. 142.
2 Bigelow Life and Accident Insurance Cases, page 4.

The insured had shot himself in a railroad car. The policy of insurance contained a clause, "in case he died by suicide. . . this policy shall be null and void, and said company shall not be liable for the loss." The questions in the case were simply these: What was the degree of insanity with which the deceased was afflicted at the time of killing, and what degree of insanity would continue the policy in spite of his self-killing?

The learned Judge thus ably states the points of difference between plaintiff and defendant:

"The plaintiff insists that this self-killing was not suicide within the meaning of that term as employed in the policy, but, on the contrary, that when Sheridan Gay (the deceased) discharged the pistol, he was insane by reason of disease, and at the time was so far unconscious of the nature and the consequences of the act which he was committing, and so beyond the government of his will, by the pressure of delirium and other blind ungovernable impulse, as to be incapable of legal under-

standing—was not the subject of legal responsibility, and, therefore, in judgment of law, incapacitated to do any act which could operate to defeat this policy. The defendants, on the other hand, insist that when Sheridan Gay killed himself, he had consciousness enough—sufficient power to choose—understanding sufficiently capable of comprehending what he was doing, and the consequences of his act, to make the act suicide within the condition of the policy."

The law, as understood by the learned Judge, and the correct rule, as we contend, was then stated by him to the jury.

"We do instruct you, in view of the claims and of the concessions, expressed or implied in the positions taken by counsel, that, if Sheridan Gay, at the time he fired the pistol, was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the defendants are not liable. And, if the act was thus committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong.

"And to give you the alternative, gentlemen, if on the other hand he was not thus conscious, or had no such capacity, but acted under an insane delusion impairing his understanding and will, or was impelled by an uncontrollable impulse, which neither his understanding nor will could resist, then the defendants are liable."

It will be observed that the word used in the policy in this case, is "suicide" in place of the expression "die by his own hand."

The cases draw no distinction between these two expressions (see Borrodaile *vs.* Hunter, and Clift *vs.* Schwabe, cited *supra*), but if there be a difference, the wording "die by his own hand" would seem to include a larger number of cases of self-killing than the other phrase, for the reason that the word suicide, from con-

stant and general use in the books as meaning felonious self-killing, might be confined in its application to such a class of self destruction..

The case of Eastabrooke *vs.* Union Mutual Life Insurance Company, 54 Maine, 224, seems to be an authority in favor of the view, that suicide by an insane person, though not so far afflicted as to be incapable of understanding the nature and physical consequences of his own act, would not avoid the policy. There is no discussion of the question in the case, whether the jury found a verdict that could not be supported by the facts proved, and the closing sentence of the opinion: "But whether these views are correct or not, the defendants had the benefit of instructions in entire conformity with the law as stated by the Supreme Court of Massachusetts, in Dean *vs.* American Mutual Life Insurance Company, and the jury have, on the evidence, found the facts such as in accordance with the law of that cause would justify their verdict," destroys the entire force of the case as an authority adverse to our position, and enables us to say, that the case was decided in accordance with Massachusetts law, and that there was enough question about the degree of insanity of the deceased to render it impossible to disturb the verdict.

No different rule has been established by the Courts of the State of New York, in the case of Breasted *vs.* Farmers' Loan and Trust Company, although that case is often cited in opposition to the position here taken. This case first came before the Court of Appeals, on demurrer to the plaintiff's replication "that the deceased was insane, and wholly unconscious of what he did, at the time of self-destruction." (4 Hill, 73). The case again came to the Court of Appeals (4 Selden, 299) on a report by Referees in favor of plaintiff.

It must be presumed that the fact stated in the plaintiff's replication, "that the deceased was wholly unconscious of what he did," was clearly shown, and the case can only be considered as authority for one presenting a similar state of facts, notwithstanding the learned

Judge, who delivered the opinion, went into other questions than those that were before the Court, and made use of dicta that might be construed as being opposed to the views here supported. The Referees not having found that the act of suicide was voluntary, the learned Judge assumes the unconsciousness of the deceased at the time of his death, of the nature and physical consequences of his act. Speaking of the English cases above cited, he says:

"If Borrodaile *vs.* Hunter, be an authority which we ought to follow, it differs so much from the case before us, that we are at liberty to decide it upon principle.

"The case of Clift *vs.* Schwabe is open to the same remark as Borrodaile *vs.* Hunter, *supra*. It turned upon the assumed fact that the act of suicide was voluntary, a fact not found by the Referees in this case."

It is to be noted that three of the Judges of the Court dissented, and expressly affirmed the English rule laid down in the cases cited, on the ground that the Referees did find that the act of suicide was voluntary. This case, therefore, shows that there was a difference in the Court on the findings of the Referees; the prevailing opinion being that the Referees should have expressly found that the suicide was voluntary, to warrant the application of the English rule (that was not disapproved), and the minority holding that the Referees had so found, and that the English rule was the correct one, and should be applied.

In the case of Fowler *vs.* The Mutual Life Insurance Company of New York, an action brought upon a policy of insurance containing a provision in the same words as that in the policy in question, payment was resisted by the Company, on the ground that the death of the insured was self-inflicted, and the insanity of the deceased at the time of the death was sought to be established as a ground of recovery. The plaintiff was non-suited at the Circuit, and on a motion for a new trial before a General Term, the non-suit was sustained. In the opinion of the Court, Justice Miller says:

"None of the cases hold that insanity alone excuses the taking of life by the insured. Something more is required, and the Courts hold that if the party is insane, it must be to such an extent as to render him wholly unconscious of the act, to entitle his representatives to recover upon the policy."

## POINT VII.

It is illogical to attempt to apply to the construction of the contract here considered the principles governing the liability to punishment of persons alleged to be insane, for acts that would be criminal when committed by persons of sound mind. The reasons for exempting a person capable of distinguishing between right and wrong from punishment, have no place in determining whether a party who has made a distinct contract with reference to a particular event, shall be held bound by his agreement on the happening of that event.

The rule most in accordance with public policy should be adopted in construing this contract.

1. The rule that policies are only avoided in cases where the insured is so insane as to be incapable of appreciating the nature and physical consequences of his act, furnishes a safe, sound basis for adjudications in this class of cases. It gives to judges and juries a standard of measurement of unvarying character, and relieves them from the conflicting theories of experts, the uncertainties and the difficulties that must attend any investigation into degrees of insanity, other than research directed to such an objective point as is here established.

2. The contract between the parties, in its literal meaning, covering even accidental self-destruction, or self-killing by the delirious, must be upheld in

its language as far as possible, and it is a matter of right on the part of those who have similar contracts, to demand a strict construction of its words, that the assets of a company (especially a mutual one) should not be diminished, except in accordance with the contract. Insanity, of whatever degree, does not avoid the contracts of those who make the ordinary agreements of daily life.

3. The temptation to an impoverished head of a family to remove himself from the world, and, by enabling his representatives to recover, on his policy to provide those who are dependent upon him with means of subsistence, would be a very great one, could he rely upon the position that slight evidence of insanity, easily manufactured by himself before the fatal deed, would counteract the express provision in the policy. This inducement would be stronger to one who was morally insane, *i. e.* incapable of distinguishing between right and wrong, than to a virtuous man in full possession of his moral faculties. Such a temptation often presented, might well excite an insane delusion that it was the duty of the insured to thus sacrifice himself to the well-being of others. Instances might be multiplied a thousand fold, in which a man, partially insane, yet, in full possession of sufficient mental power to understand that doing a certain act would result in his death, would be impelled to self-destruction by the knowledge his family could recover on the policy, and, such is the cunning of madness, the self-knowledge of his aberration would be relied upon by him to insure the recovery.

See Nimick vs. Insurance Company cited, *supra*.

## POINT VIII.

Assuming, then, that the rule of law is that here contended for, and that if the plaintiff in error had shown, to the satisfaction of the jury, that George Terry was sufficiently sane to know the consequences of the act he was about to commit when he took the poison that killed him, the jury would have been bound to have found for the plaintiff in error, evidence having been given tending to show this fact, the Court below erred in not submitting to the jury the propositions requested to be given them by the counsel for the defendant in the Court below. If these propositions are strictly correct in their statement of the law, it was the right of the plaintiff in error to have them submitted to the jury, in the precise words in which they are couched.

The proposition laid down in the second paragraph of the above statement of errors is strictly correct, since every man must be held to *intend* the natural consequences of his actions, and there is no claim in the case that the poisoning was accidental.

It is as correctly claimed in the third paragraph of that statement, that sense of moral responsibility had no necessary existence in the mind of the suicide intending his own death, and capable of knowing the nature and consequenees of his act, to hold the company not liable for the policy in question.

With respect to the positions maintained in the fourth and fifth paragraph of that statement, it is well settled that self destruction is not evidence of insanity.

> Alex. Nimick *et al. vs.* Mutual Life Insurance Company, Bigelow's Life and Accident Cases, vol. 1, page 689.

The law presumes sanity in every person unless the condition of insanity is proven distinctly. Insanity, if

alleged, must be proven by the person alleging it, and the affirmative of the issue lies upon him.

Hoge *es.* Fisher, Pet C. C. R., 163; Phelan's case, 9 Abbt.'s Pr., 286.

In the case at bar, the counsel for the plaintiff in error properly asked that the defendant in error should show affirmatively such a degree of insanity as proved the deceased to be not capable of knowing the nature of the act he was about to commit and the consequences thereof, and that the jury should be charged that if he did know the consequences of his act, and was not wholly unconscious of them, the policy was avoided.

The request contained in the sixth paragraph of the above statement is a precise statement of the law as settled by the above decisions, and should have been exactly complied with.

## POINT IX.

The Court below did not charge substantially the propositions contended for by the defendant and embodied in the requests of its counsel. By the portion of the charge contained in the eighth paragraph of the statement of errors relied upon, it was sought to be impressed upon the jury that the defendant below, resisted payment on the broad ground that any self-destruction, no matter what might be the mental condition of the suicide, should avoid the policy as being a death by the hand of the self-destroyer. It is clear from the requests to charge submitted, that the defendant below took no such position, and made no such claim, and this statement of the defendant's position could hardly have failed to have prejudiced the jury in opposition to them.

That portion of the charge contained in the ninth paragraph of the above statement, seeks to lay down to the jury a definition of the degree of insanity that will excuse an insured from the consequences of taking his own life, under the provisions of a policy such as that in the case at bar. If this instruction is too broad in its scope, and if it is found that by it less and other degrees of insanity are given to the jury as their standards of measurement, than that erected by the decisions above cited, even if the proper standard may be included in the general terms used, there should, without doubt, be a new trial. It will not be sufficient to uphold this portion of the charge to establish that in every case where a company has been held liable for the death of an insane suicide, the deceased was so insane as to come within a portion at least of the definition. As this portion of the charge purports to give the correct rule, and to lay down the law as it is, it is error for it to include cases that cannot be brought within the true rule, and if a case can be conceived that can be brought within its language, to which the rule of the decisions could not also be applied, there has been error. When the Court says to the jury, that in order to excuse an insured taking his own life, and to render a company insuring liable, the plaintiff must show such a degree of insanity as will relieve her from the general terms of the policy (eighth paragraph of statement), and then proceeds to define such a degree, and in such definition, states that the act of self-destruction must have been the consequence of his insanity, it is fairly to be implied that the Court is to be understood as laying down the rule that the company is liable in *every* case where the act of self-destruction is the consequence of the insanity. This is clearly erroneous under the rule laid down by the decisions above cited, for a case may well be conceived where the act of self-destruction was the direct consequence of some degree of insanity, and the self-destroyer remained so far conscious of the nature and physical consequences of his act as to render it impossible for the assured to recover on the policy.

Again the Court says, "the mind of the deceased must

have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing." If by this word "act" is meant the physical act alone, and by the words "using a rational judgment" is meant only, knowing that the act intended would produce death, no criticism can be passed upon the language used. But the words of the learned Judge do not necessarily confine themselves to these proper and legitimate meanings.

It is no stretch of their capacity, to conceive them as understood, or as liable to be understood by the jury, as conveying the idea, that if the deceased was so far insane as to be incapable of using a rational judgment *in any respect* with regard to the act he was committing, either as to its moral nature, and his responsibility to his Maker and God, for it, or even as to its effect upon his own reputation and good name to be left behind him in the community, that if he could not form a rational opinion, that is, such an opinion as the majority of men would form about the act, considered in any aspect, the policy could be recovered upon. This part of the charge is undoubtedly too broad, and should have been confined to the formation of any judgment involving knowledge of the physical nature and consequences of the act to be committed.

Again, to advert to that portion of the charge embraced in the tenth paragraph of the above statement, it is clearly erroneous under the law as laid down by the decisions cited above, to hold that the Company is liable "if he was impelled to the act by an insane impulse which the reason that was left in him did not enable him to resist." What is to be the touchstone by which the existence of such an insane impulse is to be discerned? Such an impulse might well exist and yet the deceased be fully aware that the act would kill, and can it be considered for a moment that with such a knowledge the company would be liable, no matter how powerful the impulse impelling to self-destruction?

On examination of the second part of this branch of

the charge, the question arises, did the learned Judge mean that the company were liable if the deceased could not exercise *all of his reasoning faculties* on the act to be committed, or could not exercise them sufficiently to know the nature and physical consequences of the act? If the latter were his meaning, no fault can be found with his words, but if his language can be deemed to carry the impression, as it certainly can be without any strain, that the company is liable if his reasoning powers were so far overthrown that he could not exercise his reasoning faculties on its moral or other (except physical) aspects of the act, or that he could not exercise his *usual* reasoning faculties even upon the physical aspects of that act, then the learned Judge was clearly in error.

Again, the learned Judge, by charging as set out in the eleventh paragraph of the above statement, that within the meaning of the policy, if in the exercise of his *usual* reasoning faculties he preferred death to life, he died by his own hand, without qualifying his remark so as to embrace the exercise of such reasoning faculties as rendered the deceased capable of knowing the nature and physical consequences of his own act, gave to the jury too broad a view of the law, and prevented their correctly applying the principle involved in the facts laid before them. The direct inference from this portion of his charge, especially when taken in connection with his former statements of the law applicable to the case, is that the company is liable in every case of suicide except one in which the deceased, in the exercise of his ordinary reasoning faculties, prefers death to life. All that is said by the learned Judge in this part of his charge is strictly true, but his language is too broad. His definition of what is dying "by his own hand," within the meaning of the policy, negatives the idea that those words can have any other meaning and can include a case of suicide, where the deceased was neither distressed nor angry, nor excited, and formed his determination to take his own life without the application of his usual reasoning faculties.

## POINT X.

The judgment of the Court below should be reversed and a new trial ordered, with costs.

HENRY E. DAVIES,
JULIEN T. DAVIES,
*Of Counsel for Plaintiff in Error.*

# Supreme Court of the United States.

DECEMBER TERM. 1871.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,

*vs.*

MARY TERRY, Defendant in Error.

(No. 401.)

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR MARY TERRY.

W. W. NEVISON,
Attorney for Pl'ff in Error.

# Supreme Court of the United States.

DECEMBER TERM. 1871.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

*vs.*

MARY TERRY, DEFENDANT IN ERROR.

(No. 401.)

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

## BRIEF FOR MARY TERRY.

### STATEMENT.

On the 22d day of July, A. D. 1867, the said Mary Terry obtained from the Plaintiff in error a policy of Insurance on the life of her husband, George Terry, in the sum of $2,000, to be paid at his death, in consideration of the payment of an annual premium of $92,84 during the life of said George Terry. On the 20th day of April, A. D. 1869, at Law-

rence, Kansas, said George Terry died, at which time said policy of Insurance was in full force, and all the conditions of said policy had been fully performed on the part of said Mary and George Terry. Due proof of death was given to said Plaintiff in error on the 28th day of June, A. D. 1869, as required by the policy.

On the 5th day of October, A. D. 1869, an action was commenced by the Defendant in error against the Plaintiff in error in the District Court of Douglas County, Kansas, and on the petition of the Plaintiff in error removed to the Circuit Court of the United States for the District of Kansas, in which Court the action was tried by said Court and a jury, on the 21st day of May, A. D. 1871, and the verdict of the jury and judgment of the Court were in favor of the Defendant in error, Mary Terry, for the amount claimed by her.

See Transcript of Records, p. 16, Records, p. 42.

In the policy there were, among other conditions, the following: "Or if he shall die by his own hand, or in consequence of a duel, or of the violation of the laws of any Nation, State, or Province," &c., the policy in that event should be null and void.

See Transcript of Records, p. 12, Records, p. 31.

The answer of the Defendant below was that George Terry "did wilfully take his own life, and said Defendants aver and say that he did then and there come to his death by his own hand, and this said Defendants are ready to make appear."

See Transcript of Records, p. 14, Records, p. 36.

To which answer the Plaintiff below replied, and denied the allegations in the answer, and averred that Terry, at the time of his death, was insane, and for a long time prior thereto had been, and at the time of taking the poison which caused his death, was so insane.

See Transcript of Records, p. 14, Records, p. 37.

On these issues the cause was tried by a jury, and evidence given fully establishing the fact that at the time said George Terry took the poison of which he died, he was insane.

On the 28th day of May, 1871, the Plaintiff filed in said Circuit Court its Bill of Exceptions, as follows:

"Be it remembered, that on the trial of this cause, in the Circuit Court of the United States, in and for the District of Kansas, at the May term, in the year of Our Lord one thousand eight hundred

and seventy one, evidence had been given to the jury by the Plaintiff tending to show that the said George Terry, at the time he took the poison, in the pleadings mentioned, was insane; and also evidence had been given by the Defendant tending to show that the said George Terry, at the time he committed self-destruction, was sane, and capable of knowing the consequence of the act he was about to commit. The Counsel for the Defendant asked the Court to instruct the jury as follows:

"'First. If the jury believe from the evidence in the case that the said George Terry destroyed his own life; and that at the time of self-destruction he had sufficient capacity to understand the nature of the act he was about to commit, and the consequences which would result from it, then, and in that case, the Plaintiff cannot recover on the policy declared on in this case.

"'Second. That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the pres-

ent case that he was impelled thereto by insanity which impaired his sence of moral responsibility, and rendered him to a certain extent irresponsible for his action.

" 'Third. The fact that George Terry destroyed his own life, is not evidence 'per se' of insanity.

" 'Fourth. The Plaintiff in this case has the affirmative of the issue, and must show by a preponderance of evidence, that said Terry, at the time he committed self-destruction, was insane and not capable of knowing the nature of the act he was about to commit, and the consequences thereof.

" 'Fifth. That if the jury believe that at the time the said George Terry took and swallowed the said poison in the plaintiff's replication set forth, and which caused his death, was not wholly unconscious of the said act, but knew what he was doing and the consequences of swallowing said poison, then and in that case the Plaintiff cannot recover on the policy declared on.' "

(The Court refused to charge as above requested, but instructed the jury as follows:)

"It being agreed that deceased destroyed his life by taking poison, it is claimed by the defendant that he 'died by his own hands' within the meaning

of the policy, and they are therefore not liable.

"This is so far true that it devolves upon the Plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have—namely, to void the policy.

"It is not every kind or degree of insanity which will so far excuse the party taking his own life, as to make the Company insuring liable.

"To do this the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

"If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand there is no presumption of law, prima faciæ or otherwise, that self-destruction arises from insanity, and if you believe

from the evidence that the decedent, although excited or angry, or distressed in mind, formed the determination to take his own life, because in the usual exercise of his usual reasoning faculties, he preferred death to life, then the Company is not liable, because he died by his own hands within the meaning of the policy.',

"To which refusal and charge, and every part of said charge, said Defendant at the time excepted, and prayed that his Bill of Exceptions in that behalf might be allowed, which is accordingly done, and upon his motion ordered to be made a part of the record in this case."

"SAM. F. MILLER, L. S."

See Transcript of Record, pp. 17-18, Record, pp. 44, 45, 46, 47.

The errors complained of here are the refusal of the Court to charge the jury as requested, and the charge of the Court as given to the jury, as above mentioned.

## ARGUMENT.

This is the condition of the case, and there is in fact but one question to be considered, and that is—

"Did the Court err in its charge to the jury?"

If it did not, then the Court committed no error in refusing to charge the jury as requested by Plaintiff in error. The Court in giving the instruction to the jury, gave substantially the charge requested by the Plaintiff in error in the 1st, 2d, 3d, and 4th instructions asked, and the last charge asked by the Plaintiff in error was directly opposed to the charge given by the Court, and if the charge of the Court was correct, then said charge asked and refused was wrong.

Was the charge given by the Court correct? We think there was no error in the charge as given. The instruction having been given by so able a Court, being composed of Miller and Dillon, J. J., we will content ourselves by adopting the opinion of the Court in the case of

Eastbrook vs. The Union Mutual Life Insurance Company, 54 Me. R. p. 224, as our argument, and cite other authorities, which we think sustain the instruction given; and having done this, will submit the case on the part of the Defendant in error.

Breasted vs. The Farmers' Loan and Trust Co., 4 Selden R., p. 299, and 4 Hill, p. 73.

Branch vs. Baxter, 2 Aiken Vt. R. p. 167.

I. Phillips Ins., 503.

State vs. Felter, 25 Iowa, p. 67.

1 Dillon, C. C. R., p. 403.

The charge of the Court in this action is fully sustained by the United States Circuit Court for the State of Connecticut in a recent case.

Gray vs. Union Mutual Life Ins. Co., 2 Bigelow, Life and Accident Ins. R. p. 4.

In that case, which was fully considered by the Court, the Court said to the jury, "if the insured destroyed himself while acting under an insane delusion

which overpowered his understanding and will, or if he was impelled by an uncontrollable impulse to the act, the Company are liable." The charge of the Court in the case last cited is able and elaborate, and reviews the whole question.

There being no error, the judgment of the Court below should be affirmed.

W. W. NEVISON,
Att'y for Pl'ff in Error.